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No. 07-1193

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In The

Supreme Court of the United States

KRISTEN DAY, et al.,

Petitioners,

vs.

RICHARD BOND, Chairman
of the Kansas Board of Regents, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents-Intervenors would restate the questions in the Petition differently, adding a "new" question #1, and restating the questions set forth as follows:

1. Should the lower courts have granted standing to Petitioners when the statute of which they complain (K.S.A. § 76-731(a)) is neither the cause of any of their real or asserted harm and where the relief sought could give them no more than ideological satisfaction?[1]

2. (Restated #1): In a preemption challenge based on conflict with a specific federal law (8 U.S.C. § 1623), where Petitioners' *sole* asserted injury derives from that law, was the Tenth Circuit correct in looking to such law to determine if Petitioners suffered a judicially cognizable injury?

3. (Restated #2): Were the lower courts correct in their determination that Petitioners in an Equal Protection Clause challenge must show for standing purposes that an injunction sought would improve, if not achieve, their chance of alleviating their asserted injury?

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[1] This is not truly a "new" question but rather one central to the lower courts' resolution of the equal protection claim (Count 7), and an important alternative ground for decision with respect to Count 2 (preemption). It was briefed and argued by the parties below, and its resolution in favor of Respondents eliminates the need to resolve the issues presented by Petitioners.

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I.
STATUTES INVOLVED

There are two additional statutes, not listed by Petitioners, that bear upon this Court's decision.

(A) 8 U.S.C. § 1621(d) provides:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

(B) K.S.A. § 76-729 provides, in relevant part:

> (a)(1) Persons enrolling at the state educational institutions under the control and supervision of the state board of regents who, if such persons are adults, have been domiciliary residents of the state of Kansas or, if such persons are minors, whose parents have been domiciliary residents of the state of Kansas for at least 12 months prior to enrollment for any term or session at a state educational institution are residents for fee purposes. A person who has been a resident of the state of Kansas for fee purposes and who leaves the state of Kansas to become a resident of another state or country shall retain status as a resident of the state of Kansas for fee purposes if the person returns to domiciliary residency in the state of Kansas within 60 months of departure. All other

persons are nonresidents of the state of Kansas for fee purposes.

* * *

(d) As used in this section:

(1) "Parents" means and includes natural parents, adoptive parents, stepparents, guardians and custodians.

(2) "Guardian" has the meaning ascribed thereto by K.S.A. 59-3051, and amendments thereto.

(3) "Custodian" means a person, agency or association granted legal custody of a minor under the revised Kansas code for care of children.

(4) "Domiciliary resident" means a person who has present and fixed residence in Kansas where the person intends to remain for an indefinite period and to which the person intends to return following absence.

II.
STATEMENT OF THE CASE

Respondent-Intervenors adopt the statement of the Circuit Court as set forth at *Day v. Bond*, 500 F.3d 1127, 1130-31 (10th Cir. 2007); however, the following should provide this Court with the rounded picture needed to resolve the Petition.

A. The Federal Foundations of K.S.A. § 76-731(a).

In 1996, the 104th Congress enacted two major laws addressing immigration issues. It first enacted the Personal Responsibility & Work Opportunity Reconciliation Act of 1996, PL 104-193, 110 Stat. 2105 (1996), 8 U.S.C. § 1601, et seq. That law, in express terms, denied most federal and state "public benefits" to undocumented immigrants. The Section which applied to state benefits (8 U.S.C. § 1621), listed, inter alia, post-secondary education benefits, as a benefit ordinarily to be denied; however, presumably for reasons of comity, 8 U.S.C. § 1621(d) was enacted, which permitted states to override this prohibition so long as they enacted a statute affirmatively providing an otherwise prohibited benefit to undocumented immigrants.[1] Subsequently, ten states enacted legislation providing for post-secondary in-state tuition to certain undocumented students. Kansas is among them.[2]

Within thirty days of the enactment of § 1621(d), the 104th Congress enacted the Illegal Immigration Reform & Immigrant Responsibility Act. The Act,

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[1] "State or local public benefit" is defined as limited to "payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(B).

[2] See p. 6, n. 4, Petition for Writ of Certiorari for a list of states; although Petitioners initially challenged Kansas' compliance with § 1621(d), they abandoned that challenge on appeal.

which further refined the relationship between government and aliens, included 8 U.S.C. § 1623, which admonishes states in extending post-secondary education benefits to undocumented immigrants under § 1621(d) to assure that they not grant "preferential" treatment to such immigrants.

B. K.S.A. § 76-731(a)

While the Act speaks for itself, several aspects should be emphasized in considering this Petition.

First, even if in-state tuition constitutes a "public benefit" under § 1621, § 76-731(a) clearly satisfies 8 U.S.C. § 1621(d), and makes clear Kansas' intent to extend the opportunity to establish residence for post-secondary tuition to certain undocumented students, it is expressly made available to *all* persons, including citizens, who meet its terms. Section (a) defines the available universe of beneficiaries as "any individual." Section 76-731(b)(2) defines an individual generally without reference to immigrant status, but in Subsection (c) reflects that "in the case of a person without lawful immigration status" supplemental conditions are imposed. Subsection (c)(1) bars those with student visas from coverage,[3] while (c)(2) denies its extension of residence to all persons (citizens and aliens alike) who are accorded residence in another

[3] By the express terms of a student visa, an eligible student agrees that his home country is his country of residence. 8 U.S.C. § 1101(a)(15)(F).

state. In short, K.S.A. § 76-731(a) assiduously adheres to 8 U.S.C. § 1623 while meeting the 8 U.S.C. § 1621(d) condition that Kansas make express that undocumented students are among its beneficiaries.

Secondly, § 76-731(a) does not replace § 76-729, the state's core residency law, but provides a new, alternative vehicle for establishing qualification for in-state tuition. This vehicle is limited to persons in whom Kansas already has a substantial investment, and who conversely have significant historical ties to the state. Only those who have gone to school in the state for a minimum of three years and who have graduated from the state's schools (or received a Kansas GED) and who (per (c)(2)) have nowhere else to go to obtain in-state post-secondary tuition are eligible to avail themselves of the Act. The Act further advances the compelling interest of keeping students in school through graduation by rewarding them with a reasonable opportunity to receive higher education. At a time when nearly 50% of low-income students drop out of school, this is no minor interest of the state.

C. K.S.A. § 76-729.

Kansas Statute Annotated § 76-726 is the core residency statute of Kansas. Like statutes in virtually every state in the Union, it denies in-state tuition to those who reside outside of Kansas. It is a traditional right of a state to establish its own residency policies to determine eligibility for in-state tuition. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 442 (1973).

D. The Petitioners/Plaintiffs

It is uncontested that each of the Petitioners resides outside of Kansas; as alleged in the Complaint, each of the Petitioners at the time of the passage of K.S.A. § 76-731(a), and at the time the Complaint was filed was in attendance at a Kansas university and paying non-resident tuition as a result of § 76-729. There is nothing in the complaint or elsewhere that alleges that any of the Petitioners have ever challenged the determination that he or she was a non-resident pursuant to K.S.A. § 76-729.

Neither has it ever been alleged that any of the Petitioners meet any of the conditions set forth in § 76-731(a). None have attended high school in Kansas at any time; none have graduated from a Kansas high school. None have a GED issued within Kansas.[4]

E. The Relief for Which the Petitioners Would Be Eligible if They Were to Prevail on Either of the Two Counts Before the Court.

1. Count 2: Preemption

Count 2 alleges that § 76-731(a) conflicts with 8 U.S.C. § 1623. In the view of Petitioners, § 1623 mandates that by extending in-state residency to undocumented students, Kansas was obligated to

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[4] The circuit court found as much. *Day v. Bond*, 500 F.3d 1127, 1131 (10th Cir. 2007). That finding is not challenged.

extend it to everyone in America. Since it does not do so, as argued by Petitioners, it conflicts with § 1623.[5]

If the Petitioners were correct on the merits, they would be entitled to an injunction enjoining the state from using § 76-731(a) in determining residency for tuition; indeed this is the relief they seek. Petitioners, as unabashed non-residents, would, as before the passage of § 76-731(a), continue to pay non-resident tuition pursuant to § 76-729. Further, as the Tenth Circuit held, any claim that the consequent payment might be lessened by the exclusion of a small number of beneficiaries of § 76-731(a) is the thinnest of reeds upon which to assert a benefit much less support standing. In short, an injunction would provide no individual relief to them.[6]

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[5] While the merits of Petitioners' claims are not presently before the Court, it is difficult to resist commenting on the absurdity of this position. First, it must be understood that if Petitioners were correct, a state would have to abandon its basic residency laws to grant in-state tuition to undocumented students – something no state would undertake. Thus, to accept Petitioners' view is to determine that Congress really sought to bar states from granting in-state tuition to undocumented students – something it could easily have done. Congress has shown with crystal clarity that it knows how to exclude undocumented immigrants from certain benefits. *See, e.g.,* 8 U.S.C. § 1612(a)(1) and 8 U.S.C. § 1621(a) and (c). It surely would not have sought to accomplish exclusion by using the language of equality.

[6] Amici seek support for their § 1623 standing argument by asserting that the District Court found that Petitioners had standing on Count 2. Indeed, at the District Court level – as opposed to the Circuit and here – the Petitioners initially

(Continued on following page)

2. Count 7: Equal Protection

The equal protection claim of petitioners is predicated on the theory that the Petitioners as United States citizens are the victims of discrimination. On this theory, the State of Kansas has affirmatively discriminated in favor of undocumented aliens. Quite apart from the implausibility of this scenario, which is not before the Court, the Petitioners confront standing problems that flow from the relief they can achieve through the injunction.[7] Most notably, the cause of the "harm" suffered by the Petitioners is not § 76-731(a) but rather § 76-729. An injunction will do nothing to relieve them of the obligation to pay out-of-state tuition; further, as the courts below found, even if a court could enjoin only that part of § 76-731(a), which Petitioners assert discriminates against citizens, the Petitioners could not qualify under the remaining parts, since they do not allege nor did they

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articulated Count 2 as an effort to "enforce" § 1623. As outlined by the District Court, the Petitioners changed their tune. In order to avoid a serious private right of action problem, they reinvented Count 2 as a preemption case, which under Tenth Circuit law did not require a private right of action. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). The Court rejected this midnight conversion, evaluated Count 2 as an enforcement action, and on *that* basis determined there was standing. *See* Discussion, *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1034-35 (D. Kan. 2005). The District Court never determined that Petitioners had standing to bring their preemption claim.

[7] In the argument below we will additionally discuss the "injury" aspect of standing which figured so prominently in the Tenth Circuit's decision with respect to each count.

in fact attend school in or graduate from, a Kansas high school. Thus, again, these Petitioners can secure, at best, only ideological relief through an injunction.

III.
REASONS FOR DENYING THE WRIT

There are three solid reasons for denying the writ. First, even if the courts below were incorrect in finding that the Petitioners had not suffered a judicially cognizable injury on either count, uncontested barriers flowing from the causation and redress conditions of standing bar relief.

Secondly, on Count 2, preemption, the courts' decision that Petitioners had not been given a right of action under 8 U.S.C. § 1623 provided a logical foundation for the determination under the facts of this case that Petitioners lacked a judicially cognizable injury for standing purposes, a ruling not in conflict with any circuit; as the Tenth Circuit observed, it is the "unique nature of the injury they [Petitioners'] assert" – one that flows *only* from the statute asserted – that made appropriate a review of whether that statute recognizes a judicially cognizable injury in Petitioners.

Finally, the court below in this case issued a mainstream decision under *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993). Furthermore, claimed conflicts between circuits in construing *Jacksonville*, while not

conceded, are nevertheless not implicated in this case.

A. Petitioners Conveniently Overlook Their Primary Barrier to Standing in Their Effort to Attract This Court. In Neither Count Before This Court Can the Challenged Statute, § 76-731(a) Be Blamed as the Cause of a Legally Identifiable Harm Nor Can an Injunction Provide Legally Meaningful Relief.

In the Petition for Certiorari, Petitioners focus exclusively on the alleged failures of the Tenth Circuit to properly recognize their "injury" as a component of standing. As will be discussed *infra*, the Circuit's rulings with respect to standing injury were eminently correct given the assertions of Petitioners and the state of the Law; however standing requires that Petitioners meet each of three conditions, injury being but one. In fact, the failure of Petitioners to meet either of the other two conditions on both counts effectively makes irrelevant in practice the ruling sought by Petitioners from this Court on injury.

There are three bedrock conditions that must be met in order to establish Article III standing. As stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected

> interest which is (a) concrete and particularized, see *id.*, at 756; *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741, n.16 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra*, at 155 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

504 U.S. 555, 560-61 [footnote omitted].

Each of these three elements must be met for Article III standing whether or not the Petitioners claim is premised on preemption or Equal Protection. *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656, 663-64 (1993); as this Court has observed "a Federal Court cannot pronounce any statute, either of a state or of the United States void because it is irreconcilable with the constitution except as it is called upon to adjudge the legal right of litigants in actual controversies." *Baker v. Carr*, 369 U.S. 186, 204 (1962), quoting

Liverpool, N.Y. F.P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885).

While this Court's ruling in *Jacksonville* articulated a liberalized view of redressability, it did not abandon the requirement. Rather than require an injunction to completely relieve a plaintiff of its asserted harm, as some courts had previously required, this Court recognized that an injunction that removed a barrier to such goal, and thus moved the plaintiff meaningfully closer to such goal, met the redressability condition of standing. *Id.* at 666. But clearly the converse must also be true: a requested injunction that does not improve a plaintiff's chances of having a recognizable harm removed cannot satisfy the redressability requirement! And an injunction that is "no more than a vehicle for the vindication of the value interests of concerned bystanders," fails to meet Article III conditions. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982), citing *United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 412 U.S. 669, 687 (1973).

This Court would have to stretch *Jacksonville* beyond the breaking point to find that an injunction would provide meaningful relief. An injunction enjoining § 76-731(a) as preempted might bring a smile to the faces of the Petitioners but would not move them any closer to removing their non-resident tuition burden.

The tuition that these Petitioners pay was "caused" by K.S.A. § 76-729 – the basic non-resident tuition law. They were paying non-resident tuition before the passage of § 76-731(a) and will continue to pay if an injunction issued that blocks its continued implementation on grounds of preemption. The outcome would be identical on Count 7, the equal protection challenge. In the extraordinarily unlikely event that the Petitioners could convince a court that there is an equal protection problem in § 76-731(a)(c)(2), and could further convince a court to merely excise that provision, these Petitioners would move not a step closer to being relieved of the obligation to pay non-resident tuition.[8] The reason: the Petitioners by the terms of the complaint do not meet any of the other conditions of § 76-731(a), e.g., attendance at a Kansas high school for three years and receipt of either a Kansas diploma or a Kansas GED.

In sum, the Petitioners request this Court to review rulings of the Tenth Circuit, that, even if

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[8] It is § 76-731(a)(c)(2) that Petitioners suggest creates a discriminatory condition. Recognizing that an injunction barring all or part of § 76-731(a) would not provide any assistance to these Petitioners, the Washington Legal Foundation amicus suggests that Kansas *could* respond by rewriting the law (p. 5, Amicus Brief). A court surely could not base standing on speculation about the Kansas legislature's response to an injunction, any more than standing could be based on supposing that a court might rewrite a statute to provide benefit to plaintiffs. *See, e.g., Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (holding that to rewrite a flawed statute would usurp the policymaking function of duly elected representatives).

wrongly decided, will not affect the outcome. Section 76-731 did not cause their distress nor will its removal solve it.

B. On the Unique Facts of This Case, the Tenth Circuit Appropriately Looked to the Statute Relied Upon by Petitioners to Determine if the Petitioners Had a Judicially Cognizable Injury in Count 2. Doing so, Conflicts With No Authority.

1. The Tenth Circuit Had Two Options to Evaluate Whether Petitioners Suffered an Injury for Preemption Purposes: Accept Uncritically the Petitioners' Assertion, or Look to the Source Cited by Petitioners to Determine if the Source Created a Judicially Cognizable Injury.

As in the courts below, the Petitioners in this Court hinge their assertion of injury for standing purposes on *one* source. As they state in their Petition for Writ of Certiorari:

> Petitioners' judicially cognizable interest in this case is their substantive right under 8 U.S.C. § 1623 to receive in-state tuition rates if any alien at a public college or university in Kansas receives that benefit.[9]

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[9] Petition for Writ of Certiorari, p. 15.

As the Petitioners' own words reveal, they either have an injury which has its source in § 1623 or they have no injury.

Confronted with this situation the Tenth Circuit could (a) have accepted at face value that Petitioners had a cognizable injury or (b) examined the cited statute to determine if Congress had created such an injury in any group of individuals and, if so, whether Petitioners were within the group. Given the constitutional obligation to make a principled Article III determination, the court chose the latter route and concluded that Congress had not created a judicially cognizable right, and thus no redressable injury was implicated. Given the unique facts of this case, where no separate injury was asserted nor evident, the court was compelled to look to private right of action law to assist it to determine if there was "an invasion of a judicially cognizable interest" which created an "injury in fact." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Concluding that Congress created no enforceable right in anyone, the Court concluded that these plaintiffs had no interest that could be considered injured for standing purposes. As the Court makes clear, it could have arrived at a different conclusion if these Petitioners could have identified an injury independent of the statute. Indeed, each of the cases cited to support their request for reconsideration involved uncontested injuries beyond those narrowly

attributable to the statute involved. *Day v. Bond*, 511 F.3d 1030, 1033 (10th Cir. 2007).[10]

2. The Cases Cited to Show "Conflict" Do No Such Thing.

The Petitioners cite several cases in which courts have stated that in the ordinary case a plaintiff must establish two conditions: (a) that he has a cause of action, and (b) that he has standing. The citations are to the effect that meeting one of these conditions does not assume that the plaintiffs have met the other. The Tenth Circuit in the instant case did not violate this principle. Indeed, in the instant case, one in which Tenth Circuit jurisprudence dispenses with the need to establish a private right of action, the court proceeded to the standing inquiry. None of the cited cases stand for the principle that in the proper case one may not be aided in the search for standing injury by looking to matters that bear on whether one has a private right of action.

The case cited as being most directly in conflict with *Day* is *Bowman v. Wilson*, 672 F.2d 1145 (3d Cir. 1982). This case, mistakenly attributed to the Second Circuit, articulates the general principle without addressing the question here. The plaintiff there was denied standing under the *Prudential* standing rule

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[10] The Petitioners essentially concede that they lack a private right of action by the abandonment of their claim seeking enforcement of § 1623.

on grounds, not that he lacked injury, but as he stated his claim, the injury complained of was to comity, for which he was the improper complainant. The case speaks not at all to the question raised here by Petitioners of whether in certain cases a court can borrow from analysis normally considered in determining a private right of action to assist with standing/injury inquiry. Indeed, the court seems to cast an eye toward private right of action law in making its standing determination. *Id.* at 1151-52.

The alleged "conflict" with the Fifth Circuit is even further afield. The case cited, *Louisiana Landmarks Society, Inc. v. City of New Orleans*, 85 F.3d 1119 (5th Cir. 1996), involved a claim by plaintiffs that a "waiver" of standing by defendants consequently resulted in a waiver of whether plaintiffs had a private right of action. Quite apart from the inability of defendants to waive standing, the court ruled that plaintiffs had stated no cause of action. The court never reached the question of how injury for standing purposes might be discerned in any case, much less a case like the instant one.

The third and final circuit which Petitioners find in conflict is the Ninth. *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), the case cited for this proposition includes no discussion as to whether, when, or under what conditions one might look to cause of action jurisprudence in evaluating standing injury. Apart from any technical injury that plaintiff might have suffered from defendants' alleged non-compliance with 42 U.S.C. § 1988, the court

attributed standing injury to the fact that plaintiff could not obtain an attorney to prosecute her claim.

In sum, the Petitioners have cited a legal principle adopted not only by the circuits set forth but one actually used by the Tenth Circuit in the instant case – the principle that one must make an independent determination of standing in each case irrespective of whether plaintiff has a private right of action (or, as in this case, needs one). None of the cited cases tell us how any other circuit would have handled the unique situation here. Under these facts, intervention by this Court is not called for.

C. There Is Nothing Wrong With *Jacksonville* That This Case Can Fix.

The second asserted ground of the Petition is that the Tenth Circuit misapplied *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993), in evaluating Petitioners' standing to bring their equal protection claim in Count 7, and in doing so contributed to uncertainty that has followed that case; to the contrary, if the court had ruled as Petitioners would have preferred, the Tenth Circuit would have abandoned the core ruling of *Jacksonville*. Further, the asserted differences

between the circuits in construing *Jacksonville* are not implicated in the instant case.[11]

First, it is essential to understand what the Tenth Circuit in fact ruled, and to apply it to the contentions of the Petitioners. The Tenth Circuit Court ruled that:

> While it is indisputable that standing to assert an equal protection claim does not require that a plaintiff show that he *would* have obtained the benefit but for the discriminatory effects of a government-erected barrier, the plaintiff must nevertheless demonstrate that he *could* have obtained the benefit. *See City of Jacksonville*, 508 U.S. at 666, 113 S. Ct. 2297. If, as in *Wilson*, a plaintiff cannot do so because nondiscriminatory

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[11] Petitioners initiate their Equal Protection discussion by setting forth their substantive argument that the state has discriminated between two "identical" groups of "non-residents": undocumented persons and non-state residents. While the substantive question is not before the Court, it is hard to let this contention pass without comment. The first group – undocumented persons and others who are beneficiaries of § 76-731(a) become so only after three years of attendance at Kansas schools, graduation from a Kansas high school, and the inability to establish residence in another state. The group that Petitioners represent have by their own terms no ties to Kansas and clear residence elsewhere. These are hardly identical groups! Furthermore, by the terms of 8 U.S.C. § 1623, Congress has granted states the right to deem undocumented students "residents" for purposes of in-state tuition. The assertion that there is discrimination between two groups of "non-residents" ignores this Congressional determination as well as reality.

> classifications would disqualify him from eligibility for the benefit even absent the challenged discriminatory classification, he cannot show injury caused by the discrimination, nor can he show injury that would be redressed by a decision in his favor; he therefore lacks standing to bring his claim. 98 F.3d at 593-94.

Day v. Bond, 500 F.3d 1127, 1130 (10th Cir. 2007).

To show a failure by the court below, the Petitioners quoted from the above, selectively removing every thing before "demonstrate" and after "obtained the benefit."[12]

The conclusion of the Tenth Circuit that Petitioners lacked standing because they could show no concrete benefit from an injunction is dead-centered within *Jacksonville*. This Court did not abandon the three elements of standing in *Jacksonville*, but concluded that the redressability condition could be met if an injunction improved the plaintiffs' position to obtain the sought-for benefit – even if it did not assure its receipt. In short, standing could be predicated on the removal of one, if not all, barriers; conversely, if an injunction does not remove any barrier and thus fails to improve in any way a plaintiff's chances of obtaining relief it must fail the standing test.

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[12] Petition for Writ of Certiorari, pp. 27-28.

As we understand Petitioners' argument, the mere allegation of a denial of equal protection would create standing because a court victory would undo the inequality – thus remedying an unconstitutional injury. There would be no need to make a showing, if Petitioners' position were adopted, that the correction of this injury would redound to Petitioners' benefit in any way.

It is argued that not only *Jacksonville* stands for this proposition, but that more recent decisions by this Court have supported this private attorney general view of standing. A quick review of those cases shows how vacuous is this contention.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1975), this Court upheld standing only after concluding that *Adarand* had to make "an adequate showing that sometime in the relatively near future it will bid on another government contract." *Id.* at 211. In short *Adarand* had to show that an injunction would positively affect its chances of receiving a contract. Similarly in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), this Court determined that plaintiffs had standing because it was likely that member children would have to compete for school slots, and in a direct way, would remove prejudice they would suffer in such competition. *Id.* at 2741. Similarly, the plurality opinion in *Gratz v. Bollinger*, 539 U.S. 244 (2003), looked to findings by the district court that the plaintiff intended to seek a transfer to Michigan if an injunction issued to support its finding of standing.

Id. at 261. In short, *Jacksonville* and its progeny have maintained the requirement that a plaintiff must establish some personal concrete benefit from an equal protection injunction in order to have standing.

In the instant case, as discussed *infra*, and as observed by the Tenth Circuit, an injunction barring the provision in K.S.A. § 76-731(a) that allegedly discriminates against citizens would not remove any barrier that Petitioners have to the receipt of in-state tuition. It would in fact be irrelevant to that goal: Petitioners are, and have always been, barred by § 71-729. Petitioners have never alleged that they meet any of the unchallenged conditions of § 76-731(a) – attendance for three years and graduation from a Kansas high school. Only if one construes *Jacksonville* as totally abandoning the redressability condition can one find fault with the Tenth Circuit's ruling on this point; and only if other circuits have construed *Jacksonville* as totally abandoning the need to show meaningful redress can one find a conflict. The cases cited do no such thing.

The circuit that is cited as having "the most direct conflict" with the Tenth Circuit is the Seventh Circuit;[13] the case cited for this proposition, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005), involved a challenge to a gambling compact between the State of Wisconsin and one Indian tribe. By the compact,

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[13] Petition for Writ of Certiorari, p. 28.

Wisconsin gave certain preference to the signatory tribe in granting licenses. Challenged by another tribe, this court granted standing even though a successful challenge to the compact would not *necessarily* result in a gaming license for the challenging tribe. In the words of the Seventh Circuit, the compact created a "cloud" over any other application by another tribe. 422 F.3d at 498. The removal of that "cloud" through an injunction would remove one barrier to the receipt of a license and thus move the challenging tribe one step closer to success.

In contrast, removal of K.S.A. § 76-731(a) or the residency provision therein would not move these Petitioners any closer to their only concrete goal – in-state tuition; for this reason these cases are in no way parallel, nor does the Seventh Circuit's ruling suggest it would have treated these Petitioners any differently if the case had arisen in that circuit.

The Petitioners' claim that the Eighth Circuit would rule differently than the Tenth Circuit is likewise misplaced. The case cited, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), involved a challenge to an initiative which barred same sex marriage or domestic partnerships. While there could be no question that the initiative served as a barrier to the plaintiffs' desire to freely marrying, there were additional barriers. Finding standing, the court found that the state, by passage of the initiative, "erected a barrier making it more

difficult"[14] for plaintiffs to achieve their goal, and that removal, through injunction, would consequently be a step toward achieving their ultimate goal. In the instant case, where these particular Petitioners face barriers completely removed from the challenged statute and/or its challenged part, and they manifestly and certainly would not achieve any relief from the injunction sought, it would violate *Jacksonville* to grant them standing. Surely the ruling in *Bruning* does not suggest that the Eighth Circuit would have ruled differently on the facts presented to the Tenth Circuit in the instant case.

The Ninth Circuit case cited, *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), may in fact cause a conflict with *Jacksonville* but does not make the instant case more worthy of certiorari! This challenge to a gun-control law seems to grant Petitioners standing to challenge a provision of the law which grants *inter alia* ex-police officers exemption from the law's prohibition on carrying assault weapons. While the case seems to stretch *Jacksonville* beyond its contours, it is hard to see how it makes the instant case worthy of certiorari. Similarly irrelevant is the Petitioners' discussion of the Second Circuit's extension of *Jacksonville* to cases beyond those dealing with public benefits. The instant case, like *Jacksonville*, deals with access to public benefit, but unlike *Jacksonville* involves a situation in which the challenged

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[14] 455 F.3d at 863.

statute, is not the cause of the Petitioners' injury, nor would removal move Petitioners even one step closer to relief.[15]

CONCLUSION

Petitioners hinge their Petition on two primary arguments. First, they have argued that the Tenth Circuit's utilization of private right of action jurisprudence to evaluate whether Petitioners have suffered a legally cognizable injury conflicts with other circuits. To find a "conflict," the Petitioners compare general admonitions taken from cases that lack the central element of the instant case – an admission by Petitioners, and a reality that the only discernable injury to Petitioners comes from the law relied upon to make their case. Under these facts, any court would have been forced to evaluate, as did the Tenth Circuit in the instant case, whether that law relied upon to establish injury, in fact, established a judicially cognizable injury. No conflict is shown. Furthermore, Petitioners understandably remain silent about their major Achilles' heel – their inability to

[15] Petitioners suggest that to deny them standing in the instant case would insulate a similar statute that barred in-state tuition to African-Americans. One can surely assume that if the plaintiff in the hypothetical were personally unaffected by the statute, other than ideologically a court would deny them standing; conversely, if the removal of the statute moved them closer to resident tuition a court would confirm standing.

establish that their tuition "problem" was caused by § 76-731(a) or will be addressed in any way by its disappearance.

Secondly, the Petitioners argue that the decision of the Tenth Circuit to apply the redress and causation prongs of standing to an equal protection claim runs afoul of this Court's rulings. To the contrary, if the lower courts had *not* continued to insist that Petitioners meet these constitutional requirements, there would have been serious problems. The courts below applied these requirements with the sensitivity required by the cases and properly denied standing to Petitioners.

The Writ which Petitioners seek should be summarily denied.

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